Editor's note: appealed - aff'd, Civ. No. 80-C-500 (D. Colo. Feb. 3, 1982), 533 F.Supp. 197; aff'd in part, rev'd in part, No. 82-1304 (10th Cir. June 16, 1983), 711 F.2d 913

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

IBLA 76-505 Decided February 20, 1980

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing the protest of the reimbursement of cost assessment for right-of-way application C-19498.

Affirmed in part and remanded in part.

1. Rights-of-Way: Generally -- Rights-of-Way: Applications -- Stare Decisis

   The Bureau of Land Management can recover the full cost of providing a service to an identifiable beneficiary regardless of the incidental public benefits flowing from that service. Charges may be made for environmental studies deemed appropriate for the proper consideration of the application.

   Recognizing the principle of stare decisis, the Board nevertheless declines to follow a decision of the same district court involving the same statute where a circuit court decision, although arising under a different statute, is of more recent vintage, takes specific cognizance of the district court decision, and the circuit court decision comports with Departmental policies.

2. Regulations: Binding on the Secretary -- Regulations: Force and Effect as Law -- Secretary of the Interior

   The Department of the Interior, as an agency of the Executive Branch of the Government, is not the proper forum to decide

whether or not a statute enacted by Congress is constitutional.

3. Regulations: Binding on the Secretary -- Regulations: Force and Effect as Law

The Boards of Appeals of the Department of the Interior do not have the authority to declare a duly promulgated regulation invalid.

4. Rights-of-Way: Generally -- Rights-of-Way: Applications

A pending right-of-way application does not create any vested right in the applicant; therefore, the application is subject to the regulations in effect when it is adjudicated.

5. Accounts: Fees and Commissions -- Accounts: Payments -- Administrative Practice -- Rights-of-Way: Generally -- Rights-of-Way: Applications

Management overhead costs are not recoverable from right-of-way applicants under 43 CFR 2802.1-2.

APPEARANCES: R. Gregory Haller, Esq., Colorado-Ute Electric Association, Inc., Montrose, Colorado.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Colorado-Ute Electric Association, Inc. (Colorado-Ute), appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated January 28, 1976, dismissing Colorado-Ute's protest of the reimbursement of cost assessment made against Colorado-Ute by BLM in connection with a right-of-way application.

Colorado-Ute is a public utility in the State of Colorado engaged in the business of purchase, generation, and transmission of electric power and energy. Colorado-Ute is a Colorado corporation organized as a cooperative association with fourteen members.

A certificate of Public Convenience and Necessity to construct, operate, and maintain the Blue Mesa-Lake City 115 kV transmission line was granted to Colorado-Ute by the Colorado Public Utilities Commission on April 23, 1974. The construction of the transmission line is to be entirely financed through loans insured or guaranteed by the Rural Electrification Administration (REA) of the United States Department of Agriculture.

On October 25, 1973, Colorado-Ute filed right-of-way application C-19498 with BLM. The application is for a right-of-way over 12 miles of BLM land for the transmission line. The application was made pursuant to 43 CFR 2802.1 (1973). At the time Colorado-Ute submitted its application a $10 service fee was required pursuant to 43 CFR 2802.1-2. Colorado-Ute was not required to pay the service fee because BLM deemed that the right-of-way would authorize use and occupancy by a Rural Electrification Administration project 1/ which was specifically excluded by 43 CFR 2802.1-2.

On April 23, 1975, 43 CFR 2802.1-2 was revised to replace the service fee charge with a reimbursement of costs procedure, 40 FR 17842 (Apr. 23, 1975). The relevant portions of 43 CFR 2802.1-2 provide:

> (a)(1) An applicant for a right-of-way or a permit incident to a right-of-way shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act (42 U.S.C. 4321-4347), before the right-of-way or permit will be issued under the regulations of this part.
>
> (2) The regulations contained in this section do not apply to: (i) State or local governments or agencies or instrumentalities thereof where the lands will be used for governmental purposes and the lands and resources will continue to serve the general public, except as to rights-of-way or permits under section 28 of the Mineral Leasing Act of 1920, as amended (87 Stat. 576); (ii) road use agreements or reciprocal road agreements; or (iii) Federal government agencies.
>
> (3) An applicant must submit with each application a nonreturnable payment in accordance with the following schedule:
>
> (i) Each right-of-way or permit incident to a right-of-way for crossing public lands (e.g., for powerlines, pipelines, roads, and other linear facilities).

1/ Under Continental Telephone of the West, 35 IBLA 279, 85 I.D. 186 (1978), a "project" must be included within the ambit of "cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act," as amended, 7 U.S.C. §§ 901-924 (1976), 85 I.D. at 189.

Length	Payments
Less than 5 miles	$50 per mile or fraction thereof.
5 to 20 miles	$500
20 miles and over	$500 for each 20 miles or fraction thereof.

* * * * * * *

(4) When an application is received, the authorized officer shall estimate the costs expected to be incurred by the United States in processing the application. If, in the judgment of the authorized officer, such costs will exceed the paragraph (a)(3) of this section, payment by an amount which is greater than the cost of maintaining actual cost records for the application review process, the authorized officer shall require the applicant to make periodic payments of the estimated reimbursable costs prior to the incurrence of such costs by the United States. Such payments may be refunded or adjusted as provided by paragraph (a)(8) of this section.

(5) Prior to the issuance of any authorization for a right-of-way or permit incident to a right-of-way, the applicant will be required to pay additional amounts to the extent the costs of the United States have exceeded the payments required by paragraphs (a)(3) and (4) of this section.

* * * * * * *

(8) If payment, as required by paragraphs (a)(4) and (b)(3) of this section exceeds actual costs to the United States, a refund may be made by the authorized officer from applicable funds, under authority of 43 U.S.C. 1374, or the authorized officer may adjust the next billing to reflect the overpayment previously received. Neither an applicant nor a holder shall set off or otherwise deduct any debt due to or any sum claimed to be owed them by the United States without the prior written approval of the authorized officer.

(9) The authorized officer shall on request give an applicant or a prospective applicant an estimate, based on the best available cost information, of the costs which would be incurred by the United States in processing an application. However, reimbursement will not be limited to the estimate of the authorized officer if actual costs exceed the projected estimate.

* * * * * * *

(15) The regulations contained in § 2802.1-2 are applicable to all applications for rights-of-way or permits incident to rights-of-way over the public lands pending on June 1, 1975.

(b)(1) After issuance of a right-of-way or permit incident to a right-of-way, the holder thereof shall reimburse the United States for cost incurred by the United States in monitoring the construction, operation, maintenance, and termination of authorized facilities on the right-of-way or permit area, and for protection and rehabilitation of the lands involved.

(2) Each holder of a right-of-way or permit incident to a right-of-way must submit within 60 days of the issuance thereof a nonreturnable payment in accordance with the following schedule:

(i) Each right-of-way or permit incident to a right-of-way, for crossing public lands (e.g., for powerlines, pipelines, roads, and other linear facilities).

Length	Payment
Less than 5 miles	$20 per mile or fraction thereof.
5 to 20 miles	$200
20 miles and over	$200 for each 20 miles or fraction thereof.

* * * * * * *

(3) When a right-of-way or permit incident to a right-of-way is issued, the authorized officer shall estimate the costs, based on the best available cost information, expected to be incurred by the United States in monitoring holder activity. If such costs exceed the paragraph (b)(2) payment by an amount which is greater than the cost of maintaining actual cost records for the monitoring process, the authorized officer shall require the holder to make periodic payments of the estimated reimbursable costs prior to the incurrence of such costs by the United States. Such payments may be refunded or adjusted as provided by paragraph (a)(8) of this section.

(4) Following termination of a right-of-way or permit incident to a right-of-way, the former holder will be required to pay additional amounts to the extent the

> actual costs incurred by the United States have exceeded the payments required by paragraphs (b)(2) and (3) of this section.

Pursuant to these regulations, on August 22, 1975, BLM sent Colorado-Ute a bill for $5,707.27 to cover right-of-way reimbursement charge for the period March 21, 1974, through July 31, 1975. BLM sent Colorado-Ute a second bill on September 16, 1975, in the amount of $7,451.60 for the estimated costs of monitoring the construction of the Blue Mesa to Lake City 115 kV Electric Transmission Line. Colorado-Ute paid both bills reserving the right to contest them at a later date. Colorado-Ute's right-of-way application was granted by BLM decision dated October 6, 1975. On October 30, 1975, Colorado-Ute filed a protest with BLM claiming a refund of the $13,158.87 assessed. BLM issued a decision dismissing the protest on January 28, 1976.

Appellant challenges the cost reimbursement on the following grounds: (1) In determining the amount of the assessment, BLM did not consider the "value to the recipient" and instead based the assessment on the "direct and indirect" cost to BLM; (2) The assessment of the major portion of BLM's costs constitute an arbitrary and unreasonable federal action in violation of the Fifth Amendment; (3) The assessment of the major portion of BLM's costs constitutes the levying of an unlawful and unconstitutional tax; (4) BLM erred in not exempting Colorado-Ute from the provisions and effect of 43 CFR 2802.1-2; and (5) BLM may not properly apply 43 CFR 2802.1-2, as amended, retroactively to costs incurred prior to its effective date.

Colorado-Ute's challenge to the method used to determine the amount of the assessment brings into question the interpretation placed upon the authorizing statutes.

The preamble to the 1975 amendment to subpart 2802 of 43 CFR states:

> [T]he primary purpose of this amendment is to provide for the recovery of costs incurred by the United States in processing applications for rights-of-way and permits incident to rights-of-way across the public lands. In accordance with the policy expressed in Title V of the Independent Offices Act of 1952 (31 U.S.C. 483a); authority contained in sections 201 and 204 of the Public Land Administration Act (43 U.S.C. 1371, 1374); and the requirements of section 28(1) of the 1973 amendments to the Mineral Leasing Act (87 Stat. 576, 579), as to oil, gas and other pipelines, an applicant for a right-of-way or permit incident thereto under Part 2800 of Title 43, Code of Federal Regulations, will be required to reimburse

> the United States for the cost of processing the application, including preparation of reports and statements concerning the impact of the proposal upon the environment. Following the issuance of a right-of-way or permit, the holder thereof would be required to reimburse the United States for costs incurred by the United States in monitoring construction, operation, maintenance and termination of authorized facilities, and in the protection and rehabilitation of the land involved.

40 FR 17841 (Apr. 23, 1975).

The Mineral Leasing Act referred to in the preamble is limited in its scope to rights-of-way "for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." By its terms the Mineral Leasing Act does not apply to electric transmission lines and as such does not provide authority for the reimbursement regulation. Public Serv. Co. of Colorado v. Andrus, 433 F. Supp. 144, 149 (D. Colo. 1977).

Sections 201 and 204 of the Public Land Administration Act (43 U.S.C. § 1371, 1374 (1970)) were repealed by the Federal Land Policy and Management Act of 1976. 2/ Section 201, 43 U.S.C. § 1371 (1970) provided in part:

> Notwithstanding any other provision of law, the Secretary of the Interior may establish reasonable filing fees, service fees and charges, and commissions with respect to applications and other documents relating to public lands and their resources under his jurisdiction, and may charge and abolish such fees, charges and commissions.

Section 201 provided authority for the imposition of fees or service charges. Public Serv. Co. of Colorado v. Andrus, supra at 155. The Supreme Court set limitations on who could be required to pay reimbursement costs and provided criteria for determining the fee charged. In National Cable Television Assn. Inc. v. United States, 415 U.S. 336 (1973), and a companion case Federal Power Commission v. New England Power Co., 415 U.S. 345 (1973), the Supreme Court analyzed the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. § 483a (1976)), which provides in part:

> It is the sense of the Congress that any work, service * * * benefit, * * * license, * * * or similar thing of value or utility performed, furnished, provided, granted * * * by any Federal agency * * * to or for any

2/ 43 U.S.C. §§ 1317 through 1374 were repealed by P.L. 94-579, Title VII, § 705(a), Oct. 21, 1976, 90 Stat. 2792.

> person (including * * * corporations * * *) * * * shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation * * * to prescribe therefor such fee, charge, or price, if any, as he shall determine * * * to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *.

The Supreme Court held that the IOAA permitted agencies to charge for services rendered and that so construed was not an unconstitutional delegation of Congress's taxing power. The Court found that the fee charged is to be measured by the "value to the recipient." In defining who should be charged for the fee, the Supreme Court adopted a 1959 circular of the Office of Management and Budget (then known as the Bureau of the Budget) construing the Act to keep the Act within the boundaries of a fee system. Paragraph 3 of Circular No. A-25 (1959) (Exh. 32) states:

> Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public (e.g. licensing of new biological products).

Colorado-Ute's first challenge to the assessment is that BLM did not use the "value to the recipient" standard in determining the amount to charge Colorado-Ute and instead based the assessment on the direct and indirect costs to BLM. "Value to the recipient" is a term that identifies what costs can be charged to Colorado-Ute.

The Secretary of the Interior determined that right-of-way costs were reimbursable. In the preamble to 43 CFR 2802.1-2 the Secretary stated:

> Applicants for and holders of rights-of-way across public lands are identifiable recipients of services above and beyond those which accrue to the public at large. The services rendered in reviewing applications and monitoring all their activities are made necessary by such applications, and the resulting costs would not be incurred by the United States in the absence of such applications. The value of the recipient of such services and of the

> right-of-way or permit issued exceed the public policy or interest served by such rights-of-way or permits. In addition, such applicants and holders receive many other Federal services for which no charge is made, such as the maintenance of offices and personnel available to process applications, the maintenance of records needed in processing applications, and the availability of the environmental, technical, economic and other studies done at Federal expense and used in application processing.

In reviewing the record we find that the BLM, Division of Technical Service Chief, requested that the Montrose District Manager provide "an estimate of the total amount of expenditures for District evaluation of the application that can be reasonably substantiated for the following two periods: initial contact regarding the proposed powerline through March 20, 1974; and from March 21, 1974, through April 23, 1975."

The Montrose District Manager responded that the district incurred costs in processing the right-of-way as follows:

Initial contract to 3-20-74	25 man days
3-20-74 to 4-23-75	49 man days
4-23-75 to date of grant	RCO5 (Project No.)
Post permit costs	4 man months

The Chief, Branch of Land Operations, administratively determined that the 25 man -- days spent prior to March 20, 1974, should not be recovered. The 49 man -- days of district time was computed at an average of $8 per hour for a total of $3,136. State Office adjudication time was valued at $112 and State Office records and clerical time costs were determined to be $16. The total direct costs were $3,264 to which was added 30 percent for indirect costs for a total of $4,243.20. The costs from April 23, 1975, to the date of grant were apparently retrieved from the computer at the Denver Service Center.

The post permit estimates were computed based on a cost of $1,433 per man -- month for a total of $ 5,732 to which was added the 30 percent for indirect costs for a total estimate for post permit cost of $7,451.60.

Computation of time spent and estimates of time to be spent on Colorado-Ute's right-of-way application based upon man -- days and man -- months is an appropriate means of determining the services Colorado-Ute received from BLM.

[1] Colorado-Ute argues that BLM should allocate the cost of the services performed by BLM between the public and Colorado-Ute charging Colorado-Ute only for the portion that is of value to Colorado-Ute. Such a procedure has been rejected. An agency can recover the full

cost of providing a service to an identifiable beneficiary, regardless of the incidental public benefits flowing from the provision of that service. Miss. Power & Light v. U.S. Nuclear Regulatory Comm., 601 F.2d 223, 229 (5th Cir. 1979) petition for cert. filed, 48 USLW 3373 (U.S. November 10, 1979 (No. 79-782)); National Cable Television Ass'n., Inc. v. F.C.C., 554 F.2d 1109, 1115 (D.C. Cir. 1976).

There is one aspect of the fees charged by BLM that warrants special consideration concerning their reimbursability. In its review of Colorado-Ute's right-of-way application BLM determined that the environmental impact statement (EIS) prepared by the Rural Electrification Administration was inadequate. BLM prepared a supplemental environmental analysis record (EAR) to supplement the general EIS. The EAR was prepared to determine the exact location of the proposed structures and necessary stipulations to mitigate the environmental damage.

In Public Serv. Co. of Colorado v. Andrus, supra at 153, the Court discussed whether environmental reports are services rendered for the special benefit of the applicant and as such are recoverable by BLM, the court said:

> The costs of environmental analyses and impact statements developed pursuant to the mandate of the National Environmental Policy Act are not of primary benefit to the right of way applicant, and thus cannot properly be charged as fees under either the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, or the Public Land Administration Act, 43 U.S.C. § 1371.

At first blush, it might appear that for the period between June 5, 1975, when 43 CFR 2802.1 became effective until October 21, 1976, when FLPMA went into effect authorizing specifically the collection of fees for administrative costs BLM could not recover the cost of preparing environmental statements from right-of-way applicants. We find that BLM is entitled to recover therefor.

While we recognize that the appeal before us relates to land within the same Federal district court which rendered Public Service Co. of Colorado, and with due deference to that court we decline to treat that decision as controlling for the reasons set forth below. We believe that Miss. Power & Light v. U.S. Nuclear Regulatory Comm., supra, ought to be followed in this matter. Although Mississippi relates to a fee schedule under a different statute, the principles enunciated thereunder override the rationale employed in Public Service and the conclusions therein.

Mississippi states in applicable portion as follows:

> Having failed to shoot down the entire fee schedule, the petitioners next take a more precise aim, hoping to

invalidate selected portions of the schedule. As an alternative argument, the petitioners concede that the Commission may assess fees, but nonetheless assert that certain fees contained in the schedule are improper. Specifically, the petitioners insist that some public benefit inheres in every service provided by the NRC, and that the agency should exclude from its fees that portion of the agency service which represents the benefit inhering to the public. This proposed allocation requirement is the basis for most of the petitioner's objections to specific items included in the fee schedule.

The Commission, of course, does not agree. It takes the position that it is not required to segregate public and private benefits and that it may recover the full cost of providing a service to a private beneficiary, regardless of whether that service may also benefit the public. We agree with the Commission.

Our position is consistent with the view of the IOAA taken by the Supreme Court in New England Power. [FPC v. New England Power Co., 415 U.S. 345 (1974)]. There, the Court cited with approval a 1959 Bureau of the Budget Circular which the Court felt represented a proper construction of the IOAA. In interpreting the Act, the Bureau opined: "Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." (J. App. 130) (emphasis added). It is true, as the petitioners point out, that the Court in National Cable [National Cable Television Assoc., Inc. v. United States, 415 U.S. 336 (1974)] criticized the FCC for assessing fees based upon a formula contrived to reimburse the Commission for its total cost of supervision. But here the NRC does not attempt to recoup all of its regulatory costs; it seeks only to recover the total cost of providing services to private beneficiaries.

The District of Columbia Circuit has also rejected the suggestion of an allocation requirement. In Electronic Industries Association v. F.C.C., 180 U.S.App.D.C. 250, 554 F.2d 1109 (1976), the Court found that the FCC was not prohibited from charging an applicant for the full cost of rendering services to him, even though some incidental public benefit might flow from the service provided.

In addition to being supported by persuasive if not controlling precedent, this approach comports with the

> clear legislative intent that agency services be "self-sustaining to the full extent possible." 31 U.S.C.A. § 483a. [Footnotes omitted.].

601 F.2d at 229-30.

Mississippi also addresses itself specifically to the propriety of charging for environmental reviews, stating:

> Next, the petitioners question the authority of the NRC to charge for the costs incurred in conducting environmental reviews required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4321. We uphold the Commission's authority to charge a fee for such reviews because they are a prerequisite to the issuance of a license. It matters not that the legal obligation of preparing environmental impact statements rests with the NRC; nor is the Commission's authority to assess such fees undercut by the obvious public benefit flowing from the preparation of these environmental reviews. The Commission must conduct these reviews before it can issue a license to an applicant; it is a necessary part of the cost of providing a special benefit to the licensee. In other words, it is "incident to a voluntary act." Because the Commission may recoup the full cost of conferring a special benefit, it may recover its costs for conducting environmental reviews. [Footnotes omitted.]

601 F.2d at 231.

Recognizing the principle of stare decisis, we nevertheless, respectfully decline to follow Public Service because Mississippi was rendered by a higher court, and is of more recent vintage (1979 v. 1977), it takes specific cognizance of Public Service (601 F.2d at 231, n.17) and does not follow it, and Mississippi comports with the Department's policies. 3/

3/ We also note that the Tenth Circuit Court of Appeals in Alumet v. Andrus, 607 F.2d 911 (1979), held that authority existed in FLPMA for the imposition of some of the costs of the preparation of an EIS. While the court noted that "[i]n this Court BLM has abandoned any reliance on [the Independent Offices Appropriation Act, supra, the Public Land Administration Act, supra, and Mineral Leasing Act, supra] and relies totally on FLPMA" (Id. at 915), examination of the briefs submitted by the Government, however, shows that reliance was abandoned not because of a belief that these three acts would not support the imposition of such costs, but rather because in the factual situation of the Alumet appeal, FLPMA would provide an independent basis for assessment. Thus, the brief of the United States argued:

Colorado-Ute also challenges a major portion of the assessment as arbitrary and unreasonable Federal action in violation of the Fifth Amendment. In a related argument, Colorado-Ute claims that a majority of the assessment was an unlawful and unconstitutional tax.

[2, 3] Colorado-Ute's challenges are directed at the authorizing legislation and the regulations promulgated by the Secretary. The Department of the Interior, as an agency of the Executive Branch of the Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional. Al Sherman, 38 IBLA 300 (1978). Similarly, Boards of Appeals of this Department have no authority to declare a duly promulgated regulation invalid. Sombrero Ranches, 38 IBLA 327 (1978); Arizona Public Service Company, 20 IBLA 120, 123 (1975).

The fourth argument presented by Colorado-Ute is that it should have been exempted from the provisions and effect of 43 CFR 2802.1-2. The basis for claimed exemption is found in 43 CFR 2802.1-7 which provides in relevant part:

> (a) Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer.
>
> * * * * * * *
>
> (c) No charge will be made for the use and occupancy of lands under the regulations of this part:
>
> (1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or

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fn. 3 (continued)

"While we think these statutes provided sufficient general authority for the Secretary to require, by regulation, the reimbursement of EIS costs, * * * Congress has now explicitly sanctioned in Sections 304(b) and 504(g) of FLPMA what the Secretary had originally provided through regulation -- namely, that as a condition to the use of the public lands an applicant for a right-of-way shall reimburse the United States for reasonable administrative costs, including the preparation of an EIS. Consequently, the Secretary's authority to require the reimbursement of EIS costs from Alumet is based on the explicit determination of Congress. (Citation omitted, emphasis in the original.)"
Brief for the Secretary of the Interior, Appellant, No. 78-1546 at 20.

We do not, therefore, read the court's decision in Alumet v. Andrus, supra, as dispositive of the applicability of the IOAA, the PLAA, or the MLA.

nonprofit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

(2) Where the permit, right-of-way, or easement is granted under the regulations in Subparts 2821, 2822, 2842, 2871, 2872.

Section 2802.1-2 (a)(1) and (a)(2) pertain specifically to cost reimbursement and provide:

(a)(1) An applicant for a right-of-way or a permit incident to a right-of-way shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act (42 U.S.C. 4321-4347), before the right-of-way or permit will be issued under the regulations of this part.

(2) The regulations contained in this section do not apply to: (i) State or local governments or agencies or instrumentalities thereof where the lands will be used for Governmental purposes and the lands and resources will continue to serve the general public, except as to rights-of-way or permits under section 28 of the Mineral Leasing Act of 1920, as amended (87 Stat. 576); (ii) road use agreements or reciprocal road agreements; or (iii) Federal government agencies.

It is Colorado-Ute's contention that it is inconsistent to require them to pay for the application services and exempt them from payment for the use and occupancy of the right-of-way. A charge for use and occupancy differs substantially from a requirement that the government be reimbursed for services performed. It is not inconsistent to exempt REA projects from a use and occupancy charge which is revenue producing while requiring reimbursement of costs for services performed by BLM benefiting Colorado-Ute. Appellant is hardly aggrieved because the Secretary has not chosen to charge users like it filing fees and rental.

Even were we convinced that Colorado-Ute should be exempted from reimbursing BLM for costs incurred, we are constrained from doing so because Section 2802.1-2(a) clearly does not exempt REA projects and we are without authority to disregard the regulations. Arizona Public Service Company, supra.

The final argument of Colorado-Ute is that Section 2802.1-2 should not be applied retroactively to costs incurred prior to its effective date.

[4] Section 2802.1-2 (a)(15) provides that the regulations are applicable to all applications pending on June 1, 1975. The right-of-way was not granted until October 6, 1975; therefore, the application was pending when the amended regulations were put into effect. A pending application does not create any vested right in the applicant. The application is subject to the regulations in effect when it is adjudicated. Continental Telephone of California, 34 IBLA 374 (1978); Arizona Public Service Company, supra.

[5] In the Government's brief in Alumet, supra, before the Tenth Circuit, the Department of Justice, at p. 22, n.20, stated, in applicable part, as follows: "BLM will provide Alumet with an itemized list of * * * costs, which will not -- consistent with FLPMA and the Secretarial Order [Order No. 3011, 42 FR 55280 (Oct. 14, 1977] -- include 'management overhead.'" In light of the foregoing, we are unable to determine whether the 30 percent charge for "indirect costs" which BLM demanded constitutes a charge for "management overhead" which is not permissible. Accordingly, we remand the case to BLM for an initial ruling on this issue subject to the further right of appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified and the case remanded for action consistent with this decision.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge